TION FILED
JG 1 1973
LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LLOYD F. CANFIELD AND ELOISE L. CANFIELD AS *AMICI CURIAE* AND MOTION FOR LEAVE TO FILE THE BRIEF

SEYMOUR GRAUBARD
JACK WEINBERG
345 Park Avenue
New York, N. Y. 10022
Attorneys for Lloyd F. Canfield and Eloise L. Canfield

Of Counsel:
GRAUBARD MOSKOVITZ MCGOLDRICK DANNETT & HOROWITZ
345 Park Avenue
New York, N. Y. 10022
212-593-3000

TABLE OF CONTENTS

	PAGE
Motion for Leave to File Brief *Amici Curiae*	1
Brief	5
Interest of the *Amici Curiae*	5
Argument	6
POINT I—The Rule 23(b)(3) Class Action Is An Essential Device For The Vindication Of Small Claims Which Are Ancillary To Claims That Satisfy The Jurisdictional Amount Requirement And, Utilized As Such Device, Would Minimize The Burden On The Courts And The Parties	7
POINT II—There Is Machinery Available Which Would Free The Courts From The Burden Of Allocating Damages	10
POINT III—If Permitted To Stand, The Decisions Of The Lower Courts Would, To A Large Extent, Render Rule 23(b)(3) Nugatory	11
CONCLUSION	13

TABLE OF AUTHORITIES

Cases:

West Virginia v. *Chas. Pfizer & Co., Inc.*, 440 F.2d 1079, 1090 (2d Cir. 1971), *aff'd* by an equally divided court *sub nom. United States* v. *Chas. Pfizer & Co., Inc.*, 404 U.S. 548 (1972) (per curiam) 7

Statutes and Rules:

28 U.S.C. § 1332(a) 2, 6, 7, 11, 12

Fed.R.Civ.P.23 ..... 2, 6, 7, 11

New York, N.Y., Code § K 51-44.0, Chapter 51, Title K 8

Other Authorities:

Wright & Miller, *Federal Practice and Procedure: Civil*, § 1784 (1972) 11

The Supreme Court, 1968 Term, 83 Harv. L. Rev. 7, 211 (1969) 12

TABLE OF CONTENTS

PAGE

Motion for Leave to File Brief Amici Curiae 1

Brief 5

Interest of the Amici Curiae 6

Argument 6

POINT I—The Rule 23(b)(3) Class Action Is An Essential Device For The Vindication Of Small Claims Which Are Ancillary To Claims That Satisfy The Jurisdictional Amount Requirement And Unlikely As Such Device, Would Minimize The Burden On The Courts And The Parties 7

POINT II—There Is Machinery Available Which Would Free The Courts From The Burden Of Allocating Damages 10

POINT III—It Permitted To Stand, The Decisions Of The Lower Courts Would, To A Large Extent, Render Rule 23(b)(3) Nugatory 11

CONCLUSION 12

TABLE OF AUTHORITIES

Cases:

West Virginia v. Chas. Pfizer & Co., Inc., 440 F.2d 1079, 1090 (2d Cir. 1971), aff'd by an equally divided court sub nom. United States v. Chas. Pfizer & Co., Inc., 404 U.S. 848 (1972) (per curiam) 9

Statutes and Rules:

28 U.S.C. § 1332(a) 2, 6, 7, 11, 12

Fed.R.Civ.P.23 ..... 2, 6, 7, 12

New York, N.Y., Code § K 51-44.0, Chapter 51, Title K 9

Other Authorities:

Wright & Miller, Federal Practice and Procedure: Civil, § 1784 (1972) 8

The Supreme Court, 1965 Term, 80 Harv. L. Rev. 1, 211 (1966) 8

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF LLOYD F. CANFIELD AND ELOISE L. CANFIELD FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

Lloyd F. Canfield and Eloise L. Canfield ("Applicants") respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae* in support of the position of petitioners herein. The consent of the attorneys for the petitioners herein has been obtained but the attorneys for the respondent herein refuse to consent to the filing of a brief by Applicants as *amici curiae*.

Applicants have an interest in this case. They are named plaintiffs in a class action brought on behalf of themselves and all other riparian land owners similarly situated, against the City of New York, now pending in the United

States District Court for the Southern District of New York (Docket No. 71 Civ. 5568). Applicants' action is analogous to the present case and the District Court will have to decide the same question as that presented for decision in the instant case, that is, whether a diversity action under 28 U.S.C. § 1332(a) will be allowed to proceed as a class action under Rule 23(b)(3), Fed.R.Civ.P, when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a) but some other unnamed plaintiffs of the class do not. Unless this Court reverses the decisions below the Canfields' action cannot be maintained as a class action.

On or about May 1, 1973, the City of New York filed a brief in this case as *amicus curiae*, supporting the position of respondent herein (the "City Brief"). The City Brief is devoted exclusively to a discussion of Applicants' pending action against the City and to the argument that the action demonstrates that affirmance of the lower court decisions herein is warranted.

Applicants believe that the brief which they are requesting permission to file as *amici curiae* will refute the City's contentions and will show that the decisions of the courts below must be reversed. Applicants' proposed brief will deal with three major points: (1) the Rule 23(b)(3) action is an essential device for the vindication of small claims which are ancillary to claims that satisfy the jurisdictional amount requirement and, utilized as such device, would minimize the burden on the courts and on the parties; (2) there is machinery available which would relieve the courts from the burden of allocating damages once the common wrong is adjudicated; and (3) if permitted to stand, the

decisions of the lower courts herein would render Rule 23 (b) (3) largely nugatory.

Applicants recognize that, under Rule 42 (2) of the Rules of this Court, the brief of an *Amicus Curiae* must be filed within the time allowed for the filing of the brief of the party supported, and that the time allotted for petitioners' opening brief on the merits has elapsed. However, since Applicants' proposed brief is in the nature of a reply to the City Brief, Applicants respectfully request that their proposed brief be deemed to have been filed within the time allowed by Rule 41 (3) of the Rules of this Court for the filing of reply briefs.

Dated: July 30, 1973.

Respectfully Submitted,

/s/ SEYMOUR GRAUBARD
345 Park Avenue
New York, N. Y. 10022
Attorneys for Lloyd F. Canfield and Eloise L. Canfield

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-888

H. KEITH ZAHN and VALERIE ZAHN, CHARLES LEAZER and MARION L. LEAZER, individually, on behalf of themselves and on behalf of all similarly situated plaintiffs,

Petitioners,

v.

INTERNATIONAL PAPER COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF LLOYD F. CANFIELD AND ELOISE L. CANFIELD AS *AMICI CURIAE*

By leave of this Court, Lloyd F. Canfield and Eloise L. Canfield (the "Canfields") file this brief as *amici curiae.*

Interest of the *Amici Curiae*

The Canfields are named plaintiffs in a class action brought on behalf of themselves and all other riparian land owners similarly situated, against the City of New York, now pending in the United States District Court for the Southern District of New York (Docket No. 71 Civ. 5568) ("Canfield"). They have a further interest in that the City of New York has filed an *amicus curiae* brief herein.

Canfield is analogous to the present case in that the District Court will have to decide the same question as that presented for decision in the instant case, that is, whether a diversity action under 28 U.S.C. § 1332(a) will be allowed to proceed as a class action under Rule 23(b)(3), Fed.R.Civ.P., when the named plaintiffs meet the jurisdictional amount requirement of 28 U.S.C. § 1332(a) but some other unnamed plaintiffs of the class do not. Unless this Court reverses the decisions below *Canfield* cannot be maintained as a class action.

Argument

The Canfields support the position and arguments of petitioners. They also point to three additional considerations: (1) The Rule 23(b)(3) class action is an essential device for the vindication of small claims which are ancillary to claims that satisfy the jurisdictional amount requirement and, utilized as such device, would minimize the burden on the courts and on the parties; (2) there is machinery available which would relieve the courts from the burden of determining damages once the common wrong is adjudicated; (3) if permitted to stand, the decisions of the lower courts herein would, to a large extent, render Rule 23(b)(3) nugatory.

POINT I

The Rule 23(b)(3) Class Action Is An Essential Device For The Vindication Of Small Claims Which Are Ancillary To Claims That Satisfy The Jurisdictional Amount Requirement And, Utilized As Such Device, Would Minimize The Burden On The Courts And The Parties.

That there is need for maintaining the Rule 23(b)(3) class action device as a vehicle for the vindication of common claims, including those of individuals who do not meet the jurisdictional amount requirement of 28 U.S.C. § 1332 (a), has been recognized by Judge Smith, who wrote the majority opinion below. Thus, he wrote:

> "Obviously the only practical way that individual consumers could recover in the circumstances of this case is through the device of class representation, and, as Judge Medina noted, 'the class suit [is designed to] provides (sic) small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.' (citation omitted)." *West Virginia* v. *Chas. Pfizer & Co., Inc.*, 440 F.2d 1079, 1090 (2d Cir. 1971), *aff'd* by an equally divided court, *sub nom. United States* v. *Chas. Pfizer & Co. Inc.*, 404 U.S. 548 (1972). (Per curiam)

Both the instant case and *Canfield* demonstrate that if the application of Rule 23(b)(3) were limited to claims of $10,000 and over, powerful individuals, organizations, or, as is the case in *Canfield*, governmental subdivisions, could deprive persons, who cannot individually shoulder the burden of maintaining independent actions, of recourse to the courts.

The members of the class in *Canfield* own water rights and riparian land located in the States of Pennsylvania, New Jersey and Delaware, downstream (south) on the Delaware River from the Downsville and Cannonsville dams. These dams were constructed by the City of New York ("City") for the purpose of impounding the waters of the Delaware River and diverting those waters to the City's water supply. As a result of these activities by the City the riparian and water rights of each member of the class in *Canfield* have been, and will continue to be interfered with, in that the Delaware River has become dirty, unsightly, unpredictable and unsuitable for those recreational, business and other activities which the members of the class in *Canfield* enjoyed prior to the aforementioned diversion of water by the City.

One of the central issues in *Canfield* arises because of Section K 51-44.0, Chapter 51, Title K, of the City's Administrative Code (the "Section"). Under the Section, the City expressly recognizes that by impounding the waters of the Delaware River and diverting those waters to its use, the City has caused a diminution in the value of riparian land situated on the New York side of the Delaware River and that the owners of such riparian land are entitled to be compensated by the City. The Section also provides for a procedure whereby the extent of the damages caused to property situated on the New York State side of the Delaware River can be determined. But the City has refused and still refuses to extend the same recognition and right of compensation to those persons, like the Canfields, whose land is located outside of the State of New York.

The City's arbitrary and wrongful conduct towards the members of the class in *Canfield* raises serious questions as to the constitutionality of the Section. However, regardless of the issue of constitutionality, the many owners of riparian land along the Delaware should not be put to the needless expense of individually litigating the issue of whether the diversion of the waters of the Delaware by the City constitutes a tortious act for which they should be compensated.

The City's filing of an *amicus curiae* brief here is consistent with its legislative effort to avoid payments to property owners of land on the New Jersey, Delaware and Pennsylvania banks of the River. According to the City, because the members of such class are numerous, each member should be required to bring a separate action. However, the City overlooks the fact that numerosity is the *sine qua non* of a class action under Rule 23, and that the plaintiff classes both in the instant case and in *Canfield* meet all of the prerequisites set forth in subdivisions (a) and (b) (3) of Rule 23, with respect to the maintenance of class actions.

An added factor to be considered is that, with few exceptions not pertinent here, the New York State Courts discourage class actions. Therefore, unless the decisions below are reversed, owners of riparian land situated on the New Jersey, Delaware and Pennsylvania sides of the Delaware River will each have to incur the expense of maintaining a separate action against the City in New York federal or state courts. Moreover, landowners who cannot shoulder the economic burden of maintaining actions on an individual basis will have been deprived of their property without compensation.

Judge Timbers recognized the significance of these considerations in his dissenting opinion below:

> "The position of the majority in this action promotes duplicative litigation—a trial of the representative claims in the federal court and identical actions by the other class members in the state court. Not only does this discourage the named plaintiffs from asserting their right to a federal forum, but it restricts the use of the Rule 23(b)(3) class action to the extraordinary situation in which every member of the class has a claim in excess of $10,000 (unless a statute dispensing with the jurisdictional amount requirement can be invoked). Furthermore, there is no guarantee that a class action could be initiated in the state court. Many states discourage class actions and if the individual claims are so small that suit would have to be instituted in a state court of limited jurisdiction, most likely the class action device would be unavailable." 469 F.2d, at 1039-1040.

POINT II

There Is Machinery Available Which Would Free The Courts From The Burden Of Allocating Damages.

It is proper to avoid the "enormously time consuming task" (469 F.2d, at 1036) of assessing the damages suffered by each member of a large class. However, in expressing this concern the courts below have disregarded their option of first determining liability for all members of the class and then assigning to a special master the tasks of determining membership in the class and assessing damages for individual claimants in accordance with a formula or guideline established by the court. An alternative would be

to try the damage issue only once, making a single award to the class, and then establishing a procedure for the presentation of claims by unnamed members of the class, and dividing the lump sum award among the class members. See Wright & Miller, *Federal Practice and Procedure: Civil* § 1784 (1972).

POINT III

If Permitted To Stand, The Decisions Of The Lower Courts Would, To A Large Extent, Render Rule 23(b)(3) Nugatory.

If permitted to stand, the decisions of the lower courts herein would limit the use of the Rule 23(b)(3), Fed.R. Civ.P., class actions to the extraordinary situations in which the class meets the numerosity requirement of Rule 23(a)(1), Fed.R.Civ.P., and each of its members can demonstrate, *ab initio*, that his recovery will probably exceed the sum of $10,000. This would be the effect even where, as here and in *Canfield*, the jurisdictional amount requirement of 28 U.S.C. § 1332(a) has been satisfied by the named plaintiffs and the controversy is already properly before the federal courts.

It is respectfully submitted that, unless this Court reverses the decisions of the lower courts herein, Rule 23(b)(3) will be largely nugatory and class actions under that Rule, which had been characterized as "spurious" class actions prior to the 1966 amendment thereof, will have been largely extinguished. It is difficult to envision a situation in which a class action under Rule 23(b)(3) would result in the recovery by each member of the class of more than

$10,000, and we are not familiar with any case in which such an award was achieved.

The congressional purpose in imposing, and from time to time increasing, the jurisdictional amount requirement was to check, to some degree, the rising case load of the federal courts. This Court's decision in *Snyder* v. *Harris*, 394 U.S. 332 (1969), is consonant with that purpose. However,

> "Although *Snyder* surely prohibits a [Rule 23] (b) (3) class action in which no member has a claim exceeding the jurisdictional amount, the decision should not be interpreted to limit the class action to the 'extraordinary situation in which every member of the class has a claim in excess of $10,000' (footnote omitted)." *The Supreme Court, 1986 Term*, 83 Harv. L. Rev. 7, 211 (1969).

Adoption of this interpretation of *Snyder* would be consistent with the Congressional purpose underlying 28 U.S.C. § 1332 (a). It can be taken as granted that, where the named plaintiffs satisfy the jurisdictional prerequisites, the caseload will not be diminished by the dismissal of the class action aspect. In such event, it is likely that the named plaintiffs will continue the prosecution of their claims on an individual basis. Whereas in a class action most of the plaintiffs would be inactive participants, this would not be true where each would have to carry the plaintiff's burden himself. Thus, a denial of class action status is bound to result in multiplicity of suits and an increase in burden on both federal and state courts.

CONCLUSION

The United States Supreme Court should reverse the decision of the Second Circuit Court of Appeals and remand the action to the United States District Court for the District of Vermont under an order giving that court jurisdiction over the unnamed persons in the alleged class.

Respectfully submitted,

SEYMOUR GRAUBARD
JACK WEINBERG
Attorneys for Lloyd E. Canfield and Eloise L. Canfield

Of Counsel:

GRAUBARD MOSKOVITZ MCGOLDRICK
DANNETT & HOROWITZ